BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BRAD V. ROBINSON	)	
Claimant	)	
VS.	)	
	)	Docket No. 222,311
SELL'S WELDING SERVICE	)	
Respondent	)	
AND	)	
	)	
FIREMAN'S FUND INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals from an Award entered by Administrative Law Judge John D. Clark on April 29, 1999. The Appeals Board heard oral argument October 8, 1999.

APPEARANCES

J. Greg Kite of Wichita, Kansas, appeared on behalf of claimant. Kendall R. Cunningham of Wichita, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge awarded benefits for a 54 percent work disability based on a 79 percent task loss and a 29 percent wage loss. On appeal, respondent contends the award should be for a scheduled injury only, the left upper extremity. The injury in dispute is an injury to claimant's head. Respondent contends claimant has no permanent impairment from his head injury. In the alternative, if a general body disability is awarded, respondent contends the disability should be limited to functional impairment on the grounds that claimant failed to make a good faith effort to find employment. If work

disability is awarded, respondent argues it should be based on a 59 percent task loss, not 79 percent.

Respondent also contends the medical expenses for the emergency room visits on June 21, 1998, and September 15, 1998, should be treated as unauthorized.

Claimant asks that the Award be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the Award should be modified to a 44 percent work disability based on a 59 percent task loss and a 29 percent wage loss.

Findings of Fact

1. On January 11, 1996, while welding a brace to an auger system, claimant fell 15 to 20 feet and suffered fractures to his skull and left wrist.

2. After his initial hospitalization, claimant received treatment from Dr. Pedro A. Murati and, while at Wesley Rehabilitation Hospital, Dr. Phillip R. Mills. Claimant was referred to Dr. Mitchell A. Woltersdorf for evaluation of possible traumatic brain injury.

3. Dr. Murati first saw claimant in February 1996 on referral from respondent's insurance carrier. Dr. Murati ultimately diagnosed: (1) status post closed head injury; (2) status post open reduction fracture with internal flexion of the radius and ulnar, and hardware removal, and (3) headaches secondary to (1). He recommended restrictions based on an FCE and added a restriction against use of dangerous machinery without supervision and work at heights greater than four feet above the ground. Dr. Murati used the FCE restrictions in spite of an indication that the FCE was conditionally invalid. Dr. Murati noted the FCE was conditionally invalid because, according to the occupational therapist conducting the FCE, claimant "demonstrates a tendency to perform beyond their safety level."

Dr. Murati concluded claimant does have impairment from the head injury. According to Dr. Murati, claimant suffered from severe headaches, had problems with balance, had short-term memory problems, and had perseveration.

Dr. Murati rated claimant's impairment as 4 percent of the whole person for the left upper extremity and 14 percent of the whole person for the head injury. He combined these ratings for a total impairment of 17 percent of the whole person.

Dr. Murati reviewed the list of tasks prepared by Mr. Jerry D. Hardin. Dr. Murati agreed that claimant cannot now do 41 of 69 tasks or 59 percent. Dr. Murati also approved

the opinion of Mr. Hardin that claimant had a 79 percent task loss. But Dr. Murati was unable to explain what the 79 percent represented.[1] He did agree that, based on his restrictions, claimant cannot do the 41 tasks.

4. Dr. Mills saw claimant during claimant's eight-day stay at Wesley Rehabilitation Hospital. Claimant was referred for evaluation by Dr. Woltersdorf, a neuropsychologist, for evaluation of possible brain injury.

5. Dr. Woltersdorf first saw claimant February 23, 1996. Based on testing done at that time, Dr. Woltersdorf thought claimant had subtle attention deficits consistent with closed head injury but also consistent with obsessive-compulsive disorder secondary to hyper diligence. At that time, Dr. Woltersdorf also felt comfortable stating the condition was work related.

Dr. Woltersdorf performed a second evaluation on May 28, 1997. From testing done at this second visit, Dr. Woltersdorf concluded claimant was malingering. He based this conclusion, in large part, on the fact that the testing suggested claimant had become worse. Dr. Woltersdorf testified the traumatic brain injury would not become worse over time.

Dr. Mills agreed with Dr. Woltersdorf's opinions.

6. Dr. Woltersdorf was not able to produce the raw data from the testing. He had only the information transferred to a separate document.

7. Claimant's counsel attempted to obtain a separate opinion from Dr. Baade regarding claimant's alleged brain injury, but Dr. Baade did not testify in this case and the parties did not stipulate to the admission of any of his opinions.

8. Based on the testimony by Dr. Murati and the testimony of claimant, the Board finds claimant did have permanent impairment from the head injury as well as a permanent impairment to the left upper extremity. Dr. Murati observed the claimant experiencing headaches. Claimant complained of loss of balance. Dr. Woltersdorf did not test for this. The weight to be given Dr. Woltersdorf's opinion is reduced by the fact he could not produce the raw data. The Board finds Dr. Murati's restrictions to be appropriate and warranted for the injury claimant suffered on January 11, 1996. In addition to the restrictions that might be attributed to the left upper extremity injury, the restrictions include others that are related to loss of balance. As indicated, respondent has not presented evidence that directly contradicts claimant's evidence on this symptom.

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[1] The 79 percent was actually an average of the 59 percent task loss with a 100 percent wage loss.

9. Because of claimant's severe headaches, Dr. Murati gave claimant a letter, dated June 12, 1996, that was to be given to emergency room personnel if necessary so that the emergency room personnel would know claimant was not simply seeking pain medications without good reason.

10. Claimant did need to go to the emergency room on several occasions from June 21, 1998, through November 27, 1998, because of headaches he was having as a result of the injuries at issue here. Dr. Murati testified these visits were necessary because occasionally claimant needed pain medication that was stronger than the Lortab Dr. Murati prescribed.

11. Claimant was able to identify only two places he had applied for employment in approximately 30 months after he left work for respondent.

12. Based on the testimony of Mr. Jerry D. Hardin, the Board finds claimant retained the ability, after this injury, to earn $300 per week.

Conclusions of Law

1. The Board concludes claimant is entitled to benefits for injury to the body as a whole, not the scheduled left upper extremity only. This conclusion rests on the finding that claimant did sustain permanent impairment from the head injury as well as from the injury to the left upper extremity.

2. The Board also finds claimant is entitled to a work disability because he has not returned to work at a wage that is 90 percent or more of his preinjury wage. K.S.A. 44-510e.

3. K.S.A. 44-510e(a) defines work disability as the average of the wage loss and task loss:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

4. The wage prong of the work disability calculation is based on the actual wage loss only if claimant has shown good faith in efforts at obtaining or retaining employment after the injury. Claimant may not, for example, refuse to accept a reasonable offer for accommodated work. If the claimant refuses to even attempt such work, the wage of the accommodated job may be imputed to the claimant in the work disability calculation. *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091

(1995). Even if no work is offered, claimant must show that he/she made a good faith effort to find employment. If the claimant does not do so, a wage will be imputed to claimant based on what claimant should be able to earn. *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

5. The Board finds claimant has not made a good faith effort to find employment and a reasonable wage should be imputed. The Board has found, based on Mr. Hardin's testimony, claimant is able to earn $300 per week. When compared to the preinjury wage of $424.40, the $300 represents a 29 percent loss.

6. The Board concludes claimant has a 59 percent task loss. This conclusion is based on Dr. Murati's testimony. Pursuant to K.S.A. 44-510e, the task loss must be based on the opinion of a physician. Although Dr. Murati initially opined claimant has a 79 percent task loss, based on Mr. Hardin's report, Dr. Murati was not able to explain that percentage. He did explain the 59 percent.

7. Claimant has a 44 percent work disability based on a 29 percent wage loss and a 59 percent task loss. K.S.A. 44-510e.

8. The Board finds the expenses for treatment at the emergency room from June 21, 1998 through November 27, 1998, to include treatment on both of those dates, should be paid for by respondent as authorized medical care. The record shows the authorized treating physician, Dr. Murati, agreed that occasional emergency room visits were necessary to relieve claimant's headache symptoms. Dr. Murati effectively authorized those visits.

9. The report of Dr. Baade is not admissible and has not been considered by the Board. K.S.A. 44-519.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark on April 29, 1999, should be, and the same is hereby, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Brad V. Robinson, and against the respondent, Sell's Welding Service, and its insurance carrier, Fireman's Fund Insurance Company, for an accidental injury which occurred January 11, 1996, and based upon an average weekly wage of $424.40, for 29.06 weeks of temporary total disability compensation at the rate of $282.94 per week or $8,222.24, followed by 176.41 weeks at the rate of $282.94 per week, or $49,913.45, for a 44% permanent partial

disability, making a total award of $58,135.69, all of which is currently due and owing in one lump sum, less any amounts previously paid.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of March 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: J. Greg Kite, Wichita, KS
Kendall R. Cunningham, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director